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STATE FOR P, SCA/FO (DAS GASTRIGHT), SCA/A (SINGRAM), S/WCI
(MSTAMILLO), L/PM (EPELOFSKY)
NSC FOR AHARRIMAN
OSD FOR ARICCI
CENTCOM FOR CG CJTF-82, POLAD, CSTC-A

E.O. 12958: DECL: 03/18/2017

TAGS: [KAWC](#) [MARR](#) [PTER](#) [PGOV](#) [PINS](#) [PREL](#) [AF](#)

SUBJECT: DETAINEE LEGAL FRAMEWORK: REVIEW BOARD MEETS
AHEAD OF INITIAL TRANSFER

REF: A. SECSTATE 35388

[1](#)B. KABUL 0806

[1](#)C. KABUL 652

[1](#)D. KABUL 369

[1](#)E. KABUL 05850

[1](#)F. KABUL 05615

[1](#)G. KABUL 05161

Classified By: Acting Deputy Chief of Mission Carol A. Rodley for reasons 1.4 (b) & (d)

[1](#)1. (S) Summary: The GOA has been informed that the first transfer of 13 detainees to the Afghan National Detention Facility (ANDF) is scheduled for March 25, when the facility will be formally opened; the actual transfer will occur on April 2. Post passed evidentiary files for the first transferees to the Office of the National Security Council (ONSC) on March 11. Regarding the legal framework, GOA Detainee Review Board (DRB) representatives have now been designated, and the DRB convened on March 19. Ministries' designation of DRB members and a memorandum on test cases (reftel D) now received from the National Directorate of Security (NDS) leave one piece outstanding in the GOA response on a detainee legal framework: The promised certification from Deputy National Security Adviser Engineer Ibrahim Speenzada that the members' designation, test case memorandum, and Part One response (reftel C) constitute a collective GOA response. The GOA has resisted stating in writing that indefinite administrative detention is a legal option and has instead asserted that all detainee cases can be prosecuted. Two significant capacity issues may impede smooth future transfers: 1) Lack of USG capacity to translate evidence into Dari far enough in advance of a detainee's physical transfer to allow the GOA adequate time to collect additional evidence and prosecute cases within legal time constraints, and 2) The untested capacity of the GOA court systems to handle the volume of transferred detainee cases. Post strongly recommends that case files from both Guantanamo Bay and the Bagram Theater Internment Facility for any detainees considered for transfer be translated and relayed to GOA as soon as possible. (End Summary)

Preparations for ANDF March 25 Opening

¶2. (S) Post informed the GOA on March 15 that the first transfer of 13 detainees would take place on March 25, and the Afghan National Detention Facility (ANDF) formal opening is now planned for that day. CJTF-82 has advised the actual transfer will occur on April 2; this specific date will not be shared with GOA due to operations security concerns. Ahead of the opening, CSTC-A has confirmed that the ANDF deputy commander about whom there were Leahy concerns (reftel E) was informed by GEN Bishmullah Khan that he would be removed from his position. Press guidance on the opening has been drafted by PAS, coordinated with military public affairs counterparts here, and cleared by Washington. Post will provide the final version to Afghan National Communication Coordination Center officials. Neither USG components here nor the GOA plan to announce the ANDF opening or that the first transfer will occur. Also in preparation for the first transfer, post passed case files for the first 13 detainees to the Office of the National Security Council (ONSC) on March 11. These files contain hard copies of English documents and Dari translations produced by CSTC-A and a CD containing documents in both languages.

Legal Framework -- On Land, At Sea, In The Sky

¶3. (S) On March 15, National Security Directorate (NDS) Senior Legal Adviser Rasoli met with ONSC Situation Room Director Mohammad Zia Salehi and polmiloff, received the 13 files of the initial transferees from Bagram Theater Internment Facility (BTIF), and delivered the requested

memorandum on the six test cases (reftels B, D; see official ONSC translation in paragraph 14 below). Rasoli's memorandum states that all cases, including Test Case C, are prosecutable. Rasoli told polmiloff that a case like "C" could merit a sentence of 10 years for illegal financial activities, that cases will be assessed for both aggravating and mitigating factors, and that there are no legal "gaps" that would affect the GOA's ability to prosecute detainee cases.

¶4. (S) After Salehi was called away, polmiloff had an extended conversation with Rasoli with only an embassy interpreter present. Rasoli observed that those in the GOA who did not see a basis for prosecuting the test cases did not know the penal law thoroughly. He pointed in particular to the penal law's sections on organized crime and crimes against internal security, emphasizing there is a legal basis for prosecuting any crime that occurs "on land, at sea, or in the sky." When questioned about use of NDS law, Rasoli confirmed that the 1987 Law on Crimes Against Internal and External Security is used in conjunction with the Discovery, Investigation and Oversight law of the Attorney General's office cited in reftel C and that there is no "secret law" specifying any additional national security crimes or basis for indefinite detention. The 1987 law is supplemented only by an administrative annex that addresses NDS internal functions. Post has previously relayed the 1987 law to the Department but has not been able to obtain a copy of this annex.

¶5. (S) Rasoli emphasized the importance of collecting sufficient evidence, noting that courts can reject cases on the basis of inadequate evidence. He said that because of the difficulty of collecting evidence in remote areas, he and others are pressing for the Criminal Code to be revised to reinstate a two-year detention period in place of the "seven months" he said is now mandated. (Note: The 2004 Interim Criminal Code specifies 30 days of pretrial detention, two months of detention during trial, and an additional total of seven months during two appeals phases. End Note) When polmiloff mentioned that ONSC had asked for case files to be transferred 30 days ahead of a detainee's physical transfer, Rasoli stated it will be important to receive the evidentiary

files as far ahead as possible of physical transfer to ensure there is adequate time to collect additional evidence and thus successfully prosecute detainees. Rasoli also suggested that he would benefit from a mentoring arrangement as the NDS reviews case files; post endorses the need for this direct assistance.

¶6. (S) Post has requested a meeting with Deputy National Security Adviser Engineer Ibrahim Speenzada the week of March 25 at which we will press for the written certification promised (reftel B), which will state that the Review Board members' designation, test case memorandum, and Part One response (reftel C) together constitute a collective GOA response on the detainee legal framework. We will also request an assurance on indefinite detention of any detainees judged nonprosecutable and will raise the evidentiary security issues outlined in paragraph 10.

¶7. (S) With regard to pressing President Karzai to accept the legal framework--i.e., the Afghan Presidential Directive (APD)--Afghan officials previously confirmed that President Karzai will not sign it (reftels F, G). Moreover, while President Karzai can sign a decree, it would then be subject to parliamentary review. Neither GOA nor post believes that a parliamentary review would lead to a favorable result. The implications of the new Amnesty bill have also not yet been taken into consideration. All 238 BTIF cases on the DOD Order of Merit have been judged prosecutable by GOA teams. We strongly recommend that GOA teams assess the cases of Afghan detainees at GTMO as soon as possible to determine if all are prosecutable. With regard to reftel A instructions on pressing the GOA regarding indefinite detention, post believes that in addition to paragraph six action, we should first see if there are indeed cases the GOA cannot or will not prosecute.

GOA Detainee Review Board Convenes

¶8. (S) ONSC convened the first Detainee Review Board (DRB) on March 19, within three days of receiving the final response from the Supreme Court, Attorney General's Office (AG), NDS, and Ministries of Interior (MOI), Defense (MOD), and Justice (MOJ). DRB members are listed in paragraph 11. While the MOJ had confirmed their representative would attend, he did not. ONSC's Salehi convened the DRB, with ONSC Communications Center Director Lutfullah Mashal also present. Acting polmilcouns, polmiloff, and CSTC-A's Chief of Detainee Operations and Staff Judge Advocate also attended.

¶9. (S) Spirited DRB discussion resulted in agreement on the following: Post will pass evidentiary files received from CSTC-A to ONSC, ONSC will pass all files to NDS for initial review, and NDS in coordination with ONSC will pass files to appropriate ministries for additional collection of evidence if warranted. The DRB thought most cases would likely be prosecuted in the national security court system. Therefore, only those files of cases destined for MOJ courts will be shared with all DRB representatives. Attendees agreed that polmiloff should meet in the near future with ONSC and NDS representatives to assess disposition of the first 13 cases, that the DRB should reconvene shortly afterwards, and that post should provide the DRB with a draft procedure outlining the relay of evidentiary material. AG-MOI-MOD-NDS teams have left notes in Dari on over 200 cases at the BTIF; CSTC-A agreed to relay all these notes to post for our onward relay to the ONSC.

¶10. (S) ONSC's Salehi emphasized the need for tight control of evidentiary files, citing a recent scam by someone who, having obtained the name of a detainee, extorted money from the detainee's family, who were found waiting near the US Embassy for the detainee's release. Following the DRB, Legal Adviser Rasoli told polmiloff privately that he had been approached on March 16 by someone claiming to be a defense attorney for one of the detainees whose files Rasoli had

received from ONSC on March 15. He suspected a leak within the Ministry of Interior and welcomed polmiloff's suggestion that post raise with Engineer Ibrahim the need for physical protection of evidentiary files.

¶11. (C) Detainee Review Board (names, titles as received from ONSC):

Mr. Saida Jan Shenwari, Director for Appeals, Attorney General's Office

Mr. Abdul Rasheed Rashid, Member of Supreme Court

General Mohammad Yousif, Deputy Director of Legal Affairs, MOD

Abdul Qayuum Nezami, Legal Affairs Department, MOD

General Jamaluddin, Deputy Director of Intelligence, MOI

Mr. Zuhore-u-Rasoul, Legal Adviser to NDS

Mr. Abdulsalim Asmat, General Director of Prisons, MOJ

Capacity Issues -- USG Translation, GOA Court System

¶12. (S) The GOA has requested that evidentiary files be passed 30 days ahead of physical transfer (reftel B); post suggested DRB participants advise us if more time is needed to gather evidence. Post believes it is imperative to transfer files for all planned transferees as soon as possible to ensure that the GOA has adequate time to research cases, collect additional evidence, and then prosecute the detainee within the time constraints mandated by the Interim Criminal Code. We strongly recommend that all files of Afghan detainees at Guantanamo Bay who are under consideration for transfer as well as files for all 230-plus detainees on the BTIF Order of Merit list be translated and relayed immediately to post for onward relay to GOA. Receipt of the Guantanamo files will also facilitate preparation for a site visit by GOA investigators COL Khadghul Hammad (MOI) and Colonel Abdul Jalil Muldafi (NDS).

Based on the time needed to produce the initial transfer's 13 case file translations, CSTC-A estimates that a dedicated unit of five translators could translate 20 case files per month; CSTC-A is staffing a request to establish such a unit.

¶13. (S) The capacity of the GOA national security and civil courts to absorb the volume of transferred detainee cases is also an unknown variable at this point. When requested to provide an estimate as to how many cases they believed their system could accept in any given time period, the DRB expressed the opinion that they were unable to make such an estimate at this time. They stated that they would be better suited to answer after evaluating their experience with the initial 13 cases. Post will monitor the time needed to indict and prosecute the initial 13 transferees.

Text of GOA Memorandum -- Response on Test Cases

¶14. (S/REL GOA) (STAMP) 28-11-(illegible) 0773

Islamic Republic of Afghanistan

National Directorate of Security

Office of the Legal Advisor

To: The Office of National Security Council
Islamic Republic of Afghanistan

In reference to your letter No. 3183 dated 14/11/1385 (March 5, 2007), we have the honor to state that:

While considering cases (A, B, C, D, E and F), it is worth mentioning that in regard to the transfer and any other measures needed for the next legal and judicial investigations of detained Afghan prisoners in Guantanamo and Bagram prisons, we have come to a conclusion that the abovementioned cases are clear and documented in accordance with the penal code of Afghanistan and are prosecutable.

Best regards

Senior Legal Advisor

Best regards,
(Signed) Sayed Zahor Rasoli
Senior Legal Adviser
(end of text)
NEUMANN